Teil 4 – Dogmatische „Wildwüchse“

1ter Diskutant – Prof. Gilian Davies

Thank you very much.

First of all, I would like to thank you very much for the invitation to participate in this really very interesting seminar. I have been enjoying myself enormously listening to all the contributions. The two papers that we have heard this morning from Mr. Koelman and Christophe Geiger have also provided us with much food for thought and it is a pity that I had not actually heard these arguments before I prepared my remarks.

I want to pick up on three topics this morning: firstly, on the question of the justifications of copyright and the functions of copyright, secondly, the tension between the droit d'auteur and the copyright systems. Thirdly, and finally, I want to say a few words on the issue of copyright and public policy - the desiderata for a state policy on copyright.

So, first of all, on the justifications for copyright, it seems to me that the underlying principles on which the modern international copyright system is founded, and which we should not forget have served the world well for 300 years, fall under four main headings which we have touched on in previous discussions. Firstly, natural law: the work belongs to its creator and it is the expression of his personality. Secondly, just reward for labour: the author is entitled to economic rewards, and of course today copyright provides the economic basis for investment by the cultural industries in the creation, production and dissemination of works. Thirdly, there is the function of stimulating creativity, and of course this is inextricably linked to the justification of just reward for labour, because such reward provides, in principle, this stimulus to creativity. Finally, there are the social requirements which we have also discussed. The social usefulness of copyright consists in providing an economic basis for creation but, at the same time, there is a social requirement in the public interest that authors and other right owners should be encouraged to publish their works and to create, so as to permit the widest possible dissemination of works to the public at large. Of course, this was the rationale of the original copyright act, the Statute of Anne in 1709 in the U.K., which, according to its preamble, was for the encouragement of learned men to compose and write useful books. This idea of the need to promote the progress of science was taken up some years later in the U.S. Constitution.

In some of the discussions that we have heard this week, justifications two and three, the just reward for labour and stimulus to creativity have been put into question. Several people have asserted, and even Christophe takes this view, that hardly any authors actually benefit from copyright these days, and that therefore it cannot provide much incentive to creativity, and I concede that there are many other motivations for creative work, such as fame and academic recognition, and so on. This may be true in the case of academia but I think that we should not forget that there is a huge number of individual authors of books covering the whole gamut of literature from fiction to education, and everything in between from thrillers to children's books and so on and so forth. Then we have the songwriters, composers and artists, who earn their living through copyright. This is to say nothing of the so-called "cultural industries" which also depend on copyright. I think we should make no mistake that the economic importance and value of copyright has never been higher and the same goes for the value of trade in copyright and other IP. So copyright matters, not only to in-

dividual authors but also to the publishers and the cultural industries who act as intermediaries between authors and their publics. It also matters very much to governments who highly appreciate the contribution of copyright to the gross domestic product.

There has also been a lot said here also about the “Verwerter”. It seems to me that Verwerter is rather an unfortunate word, because it translates into English as "exploiter". Here I do not think we are talking about exploiters; we are talking about people who are in partnership with the author. The publisher is a partner of the author, he is not an exploiter. That is not to say that some people do exploit perhaps, but I think we should not fall into the trap of thinking that all those who, as it were, act as intermediaries between the authors and their public are all wicked exploiters.

The present-day copyright system, as it has developed over the last 300 years, has created, in my view, in the public interest, a balance between the rights of the authors, on the one hand, in the widest sense of the term "author", and the interests of the public in access to protected works, on the other. Therefore, from the beginning, these rights have been subject to limitations of duration and exceptions for a wide variety of uses. Here, I want to stress that, in my view, the public interest in copyright is twofold. It is not just in the question of access. Firstly, there is a public interest in having a system of copyright to encourage and promote creativity. Secondly, having given these rights, there is a public interest in controlling them to ensure the widest possible dissemination and accessibility of the resulting works.

In assessing the need for copyright reform, these historical justifications still have their place, I think. They may not reflect a perfect philosophy but they are hard to replace. Christophe has suggested that they are out of date, and the recognition of copyright as a human right would have advantages, and, as he pointed out, copyright has been recognised as such for many years in the Universal Declaration of Human Rights. Again, on the basis of this balance of interests, on the one hand, this Declaration says that everyone has the right to the protection of their moral and material interests resulting from their literary or artistic production, but at the same time the right is juxtaposed to the right to access to culture and the arts as a human right. In fact, the Universal Declaration of Human Rights rather reflects the traditional justifications for copyright and the need for this balance of interests between creators and the public.

I am not against the idea of copyright as a human right being, as it were, given more prominence. It supports, of course, the natural-law justification for copyright. It follows from such a human right that copyright should be protected as a matter of principle, but I am somewhat doubtful about how such general principles could fill gaps in copyright legislation. Certainly I think that in the common-law countries it would be very difficult to develop a case law to fill such gaps on the basis of human rights.

The fundamental principles of justification for copyright that I have briefly touched upon are, of course, cumulative and interdependent. They are applied in the justification of copyright in all countries, although different countries place varying emphasis on each of them. To generalise, one can say that the economic and social arguments are given more weight in the countries of the common-law copyright tradition, whereas the continental countries of the civil-law tradition and the droit d'auteur put the emphasis on natural-law arguments, especially with regard to the development of moral rights. However, in my view, these differences should not be exaggerated. His-

torically and today there is much common ground in the justifications for copyright in both systems.

This leads me to my next topic, which is the tension between the droit d'auteur and copyright: the two cultures – if one may put it that way – of copyright. Christophe has suggested that this distinction has been much exaggerated, and I agree with him. I think the differences are, anyway, not so significant as has often been suggested, and elements of each system have always been present in the other. Copyright and droit d'auteur share the same roots and the historical justifications discussed. I tend to think the distinction is now out of date, if not yet obsolete. In the context of EU harmonisation of copyright, it cannot survive anyway. The convergence has been under way for some time. First the Berne Convention built bridges between the systems by accommodating both, and where Berne led, TRIPS has followed. In Europe the distinctions of the past are fading quickly with the adoption of the series of directives on copyright and related rights.

I was going to talk more about the traditional differences between the systems but, because of the time, I will just briefly mention the definition of originality, formalities, authorship and ownership of rights, moral rights and related rights. All the differences that existed before have largely disappeared as a result of international and European harmonisation. It has had a huge converging impact on the subject. The TRIPS Agreement includes a number of provisions, concerning particularly some of the related rights, which have represented one of the main differences between the copyright system that incorporated related rights and the droit d'auteur system that had them separately. The level of protection afforded to right owners by related rights has now been harmonised in both systems to a very large extent. Of course, the difference in philosophy remains and is reflected in the terminology, but in practice the level of protection for related rights is becoming uniform. In this particular respect, the best way forward seems to me to set objectives for the standard of protection to be achieved rather than to strive towards complete assimilation of the systems, and to leave it to the individual governments to implement protection of various right owners in accordance with their national approaches.

Finally, I would like to remark that, so far as the differences between droit d'auteur and copyright and the harmonisation of related rights is concerned, the European Commission announced in September, as you all probably know, its intention of embarking on a full codification of the law on copyright and related rights as established by a number of EU directives.

My last thesis is "Copyright and Public Policy".

Mr. Koelman has rightly drawn attention to copyright as part of information policy but it is not only that. It also belongs in cultural policy and the economic and trade policies of states: cultural policy because of its basic aim of promoting creativity; information policy because of the public interest goals of encouraging learning and access to works; and, finally, economic policy because of the huge economic impact that copyright has on GDP and international trade.

In establishing such policies and reflecting on the need for new legislation to adapt copyright to new challenges, such as the digital information society we live in now, the functions of copyright should always be borne in mind. Copyright emerged originally to protect the printing trade. It has constantly had to be adapted to the challenges posed by new technology. Experience has shown the need for such adapta-

tion to follow swiftly on the introduction of new technology and other uses of works in order to prevent entrenched interests from opposing any curtailment of free use.

States need to pursue a policy of regular review of copyright laws to respond to the agendas set by new technical developments and their impact on copyright law. In doing so, they have to recognise and balance the interests of copyright holders and the public at large. The legislature must also attend to the voices of less-powerful interests in order to achieve a sound public policy. It is their job to intervene to adapt the law to new technology and to redress the balance where required between the interests of right owners and access.

In arriving at such a policy, I would propose that the legislature should keep in mind the six ideals of copyright propounded by my hero, Professor Zachariah Chafee, who anybody who has read my book on "Copyright and the Public Interest" will know as having a big influence on me, in his seminal essays reflecting on the role of copyright in society. In 1945 he suggested that the law should seek to attain, so far as practicable, six ideals: complete coverage for all intellectual and artistic creations, a monopoly against all forms of reproduction, international protection, absence of excessive protection for the monopoly, refusal to stifle independent creation, and, finally, legal rules convenient to handle. If copyright is too complicated, it will not work.

These ideals have not dated. Copyright principles do not change: only their application. Of course, the formulation of principles does not solve all problems but they do help. One can keep aiming at them in deciding what justice requires and in taking the necessary hard decisions in the general public interest of society as a whole. This remains the challenge of the lawmaker in the field of copyright, and in the digital world of the information society the task of achieving a balance between exclusive rights and access to works is harder than ever.

Thank you.

Prof. Reto M. Hilty
Herzlichen Dank, Frau Davies, für diese Klarstellungen und Positionierungen. Ich darf direkt Herrn Strowel übergeben.